FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 14, 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2004-43

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Washington, D.C. 20005

Dear Mr. Skall:

We are responding to your advisory opinion request on behalf of the Missouri Broadcasters Association ("MBA") regarding whether, under the Federal Election Campaign Act of 1971, as amended ("FECA"), a broadcaster would be making a corporate in-kind contribution by selling advertising time at the Lowest Unit Charge ("LUC")[1] to a candidate who may have failed to include a fully compliant Communications Act Statement in one of his advertisements and, therefore, may not be entitled to the LUC under section 315(b) of the Communications Act. 47 U.S.C. 315(b).

***Background***

The facts of this request are presented in your letter of October 29, 2004, as supplemented by your letters of November 19, 2004, January 21, 2005, and February 8, 2005.

MBA is a voluntary association of broadcasters who are Federal Communications Commission ("FCC") licensees of radio and television stations throughout Missouri. In its request, MBA asks the Federal Election Commission ("FEC") to assume that Senator Christopher Bond's advertisements did not contain a fully compliant Communications Act Statement and that he therefore was not entitled to the LUC. The MBA then asks about the legal consequences of a broadcaster having nonetheless afforded the benefits of the LUC to Senator Bond.

[1] The LUC is the lowest advertising rate that a station charges other advertisers for the same class and amount of time for the same period. *See* 47 U.S.C. 315(b)(1) and 47 CFR 73.1942(a)(1).

FECA prohibits any corporation from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). FECA and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or anything of value for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.52(a) and 100.111(a); see also 2 U.S.C. 441b(b)(2) and 11 CFR 114.1(a)(1) (providing a similar definition for "contribution or expenditure" with respect to corporate activity). Commission regulations further define "anything of value" to include all in-kind contributions and state that, unless specifically exempted under 11 CFR 100.71(a), the provision of any goods or services (including advertising services) without charge, or at a charge which is less than the usual and normal charge for such goods or services, is a contribution. 11 CFR 100.52(d)(1); see also 11 CFR 100.111(e)(1).

The Bipartisan Campaign Reform Act of 2002, P.L. 107-155, 116 Stat. 81 (March 27, 2002) ("BCRA"), amended section 315 of the Communications Act of 1934, 47 U.S.C. 315(b), such that a Federal candidate "shall not be entitled" to the LUC if any of his advertisements makes a direct reference to his opponent and fails to contain a statement identifying the candidate and stating that the candidate approved the communication (the "Communications Act Statement"). For radio broadcasts, the Communications Act Statement must consist of a personal audio statement by the candidate identifying himself and the office sought, and stating his approval of the message. In the case of television advertisements, for a period of no less than four seconds at the end of the ad, there must appear simultaneously (i) a clearly identifiable photographic or similar image of the candidate; and (ii) a clearly readable printed statement, identifying the candidate and stating that he has approved the broadcast and that his authorized committee paid for the broadcast.

BCRA also amended section 441d of FECA to include a similar, though not identical, required statement in political advertisements (the "FECA Statement"). The FECA Statement for any radio advertisement, whether or not the ad mentions a candidate's opponent, requires the candidate to identify himself, and state that he approved the message. The FECA Statement does not require a candidate to state the office he is seeking. For any television advertisement, the FECA Statement requires a candidate to identify himself and state that he approved the communication. This must be done either (1) while an unobscured, full-screen view of the candidate is displayed, or (2) by means of a voice-over by the candidate, accompanied by a clearly identifiable photographic or similar image of the candidate. The statement must also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, and for a period of at least four seconds. 2 U.S.C. 441d(d)(1); *see also* 11 CFR 110.11(c)(3).

Although the Communications Act generally requires broadcasters to charge candidates the LUC for a candidate's political advertisements in the 45 days preceding a primary election and the 60 days preceding a general election, BCRA amended 315(b) of the Communications Act to provide that a Federal candidate "shall not be entitled" to

receive the LUC if any of his advertisements failed to include a fully compliant Communications Act Statement. 47 U.S.C. 315(b). Specifically, once a broadcaster airs a Federal candidate's political advertisement that does not contain a fully compliant Communications Act Statement, that candidate is no longer guaranteed the LUC for any advertisement aired in the remaining days leading up to the election.

***Questions Presented***

*Does a broadcaster make an in-kind contribution by charging a Federal candidate the LUC for advertising time when the candidate may not be "entitled" to the LUC under the Communications Act? If the LUC is an in-kind contribution, must the broadcaster re-bill the candidate for the difference between the LUC and some higher rate?*

The Commission concludes that a broadcaster's decision to offer Senator Bond the LUC under these circumstances did not result in an in-kind contribution under FECA and Commission regulations.

The Commission has reviewed the ads provided by MBA and has concluded that there is no violation of any disclaimer requirement over which the Federal Election Commission has jurisdiction. The Commission notes that the disclaimer requirements in the Federal Election Campaign Act are substantially similar to those in the Communication Act, and that the FEC has substantial expertise in evaluating disclaimer issues. Moreover, the FCC has not, to our knowledge, come to a contrary conclusion, either through evaluation of the merits in this case or by promulgating regulations (under the disclaimer provisions of the Communications Act) that would warrant a different result.

Because the Commission concludes that there is no evidence of a violation of the disclaimer requirements, providing the LUC did not, in this instance, result in an in-kind contribution. The Commission need not reach your question regarding re-billing.

The conclusion in this response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Scott E. Thomas
Chairman

**Concurring Opinion of Chairman Scott E. Thomas**
**Re Advisory Opinion 2004-43**

In this matter the central question was whether a broadcast station could offer "lowest unit charge" (LUC) to a candidate campaign that purportedly had not complied with the 'stand by your ad' component of the Bipartisan Campaign Reform Act.[2] In determining whether a station has made an in-kind contribution by charging too little, the FEC normally must analyze whether a station has provided its services for the "usual and normal" charge in a commercial sense. 2 U.S.C. § 431(8)(A); 11 C.F.R. § 100.52(d). Nonetheless, if the station was required to offer LUC by operation of law, there would be no basis for the FEC to find that the station had violated the in-kind contribution prohibition of 2 U.S.C. § 441b.[3] This becomes, in essence, the initial level of analysis in these circumstances.

The FEC, therefore, was placed in the awkward position of trying to divine whether the stations here involved were required by operation of law to offer LUC airtime to the Bond campaign. According to the applicable BCRA provisions, a station is only required to offer LUC if a candidate satisfies the 'stand by your ad' disclaimer rules. In theory this is a matter for the FCC to decide, but the FEC cannot expect the FCC to rule on each matter brought to the FEC's attention. In my view, if asked in an advisory opinion context, the FEC is required to do its best to assess how the FCC would apply the 'stand by your ad' rules in order to determine whether the stations in question were required to offer LUC.

After reviewing the ads of the Bond campaign that raised questions on the part of the stations, I conclude that the FCC most likely would say that the 'stand by your ad' requirements were met. In the case of the television ad, the image of the candidate is sufficient to satisfy the 'clearly identifiable image' requirement of 47 U.S.C. § 315(b)(2)(C)(i), in my view. As for the radio ad, though there is no express indication of which office is sought (*see* 47 U.S.C. § 315(b)(2)(D)), I don't see any reasonable ambiguity about which office is at stake, and I see no basis for believing the FCC would find the disclaimer inadequate when viewed in its entirety. Accordingly, my assessment is that the FCC would conclude the stations were required to offer airtime at the LUC.

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[2] These terms are part of the Communications Act, codified at 47 U.S.C. § 315(b).

[3] As a practical matter, for years the FEC has taken this legal posture. I am aware of no case where a station obligated to provide LUC to a campaign has been questioned about making an in-kind contribution by virtue of charging too little.

That means the FEC must conclude in this advisory opinion that no undercharge resulted warranting a rebilling of the candidate.[4] I joined in approval of the language offered by Commissioner Weintraub because it basically follows this approach.

I do not subscribe to the view that stations would be able to offer LUC to a candidate who had not satisfied 'stand by your ad' requirements simply because some other candidates were required to be given LUC. While the FEC ruled in the pre-BCRA era that stations willing to treat all candidates the same could provide ad time for free,[5] the 'stand by your ad' provisions in BCRA signaled a significant change in Congress's approach in this area. It is very clear to me that candidates who do not comply with the new disclaimer requirements are to be prevented from getting the benefit of LUC.[6] Thus, any previous FEC rulings allowing stations great latitude to charge less than "usual and normal" commercial charges for ad time must be read in a way consistent with the strict new BCRA provisions. In my view, the only way to give all the applicable provisions meaning is to subject a candidate that has not complied with the 'stand by your ad' requirements to the "usual and normal" commercial charge analysis.[7] Since the stations in question routinely must make such calculations outside the LUC timeframes, I see little problem with placing that burden on them.[8]

A caution about deferring to the FCC's legal tilt is in order. The FCC indeed may have no concern about stations offering time at LUC to a non-complying candidate. Though I find that an untenable construction of the 'stand by your ad' provisions, I note it

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[4] If the FCC were to clarify later that the stations in question had not complied with the 'stand by your ad' provisions, I presume the stations would either renew their advisory opinion request or act on their own to resolve any potential FECA problem.

[5] In Advisory Opinion 1998-17 (available at www.fec.gov) based on the 'commentary' allowance for media entities, the FEC allowed a cable station to provide free ad slots to all candidates in various federal races. This opinion was hinged on an understanding that the station would adhere to the 'equal opportunity' obligations imposed under the Communications Act and that any effort by the station to give preference to a particular candidate would negate application of the 'commentary' allowance.

[6] I cannot find any vagueness in the statutory phrasing ("shall not be entitled to receive the [LUC];" 47 U.S.C. § 315(b)(2)(B)). Even if this were vague, I doubt Congress would have enacted a statute that had absolutely no purpose or function, and I wouldn't expect the FEC to so interpret the statutory language.

[7] In my view, Advisory Opinion 1998-17 would have to be at least partly superseded. Any candidate whose ads do not meet 'stand by your ad' requirements would have to be charged "usual and normal" commercial fees even though all other candidates in a race potentially could be given free ad time. This is an area the FEC may have to rethink in light of BCRA's stand by your ad provisions.

[8] This is not to say the calculations are easy. The submissions of the requestor and commentors make clear that several different components go into any decision about what rate to charge advertisers. The main concern from the FEC's perspective is that the same components applied to non-candidate customers be applied to the non-complying candidate. It may turn out that the "usual and normal" charge here would be very close to LUC.

A separate concern raised by the requestor concerns the difficulty a broadcaster has in knowing if a particular ad meets the 'stand by your ad' specification. I gather that Congress intended to place some burden on broadcasters in this regard, though not to the point of becoming 'enforcers.' In my view, It would be plausible, absent complete absence of a disclaimer, for a broadcaster to wait for a complaint to be filed by someone before looking into the specifics regarding particular ads. Nonetheless, there will be situations where a station would like to avoid having to charge a particular candidate more than other candidates. This suggests that stations have an interest in making some effort to review ads so that 'stand by your ad' omissions don't lead to the complications presented in this request.

stems from a completely different regulatory focus: ensuring that stations offer reasonable access and equal opportunity to candidates. Indeed, the FCC would be satisfied by stations offering ad time for absolutely no charge across-the-board to candidates.[9] That is far afield from the usual focus of the FEC: assuring that vendors don't provide services for less than the "usual and normal" commercial charge.

In sum, the facts at hand suggest the stations would be required to provide air time to the candidate at LUC. Therefore, by operation of law there is no basis for the FEC to conclude that a different rate should have been charged. While the legal assumption underlying this conclusion might prove faulty if the FCC were to rule specifically in this set of circumstances, the FEC for the time being must proceed with its own best assessment of the LUC obligations of the stations seeking guidance.

2/16/05 / s /

Date Scott E. Thomas
Chairman

[9] In a comment submitted during the FEC's consideration of Advisory Opinion 1998-17, the FCC made clear that it construed the pre-BCRA provisions of the Communications Act in this fashion. It relied particularly on legislative history indicating Congress's desire to restrain the cost of campaigns.

**CONCURRING OPINION OF COMMISSIONER DAVID MASON**
**RE: ADVISORY OPINION 2004-43**

This request was premised on an assertion that Senator Christopher Bond had "lost his entitlement" to the Lowest Unit Charge (LUC) provision of the Communications Act due to alleged deficiencies in the "stand by your ad" disclaimer required by the Communications Act, 47 U.S.C. § 315(b)(2)(C), (D), and the Federal Election Campaign Act (FECA), 2 U.S.C. § 441d(d)(1), as amended by the Bipartisan Campaign Reform Act (BCRA), P.L. 107-155, 116 Stat. 1981 (March 27, 2002). The Commission concluded, contrary to the asserted premise, and in the absence of regulations or other guidance from the Federal Communications Commission (FCC), that the disclaimers in the subject advertisements sufficed for the LUC discount, and responded to the request on that basis.

Although individual Commissioners have expressed views about how the Communications Act and the FECA might be applied to inadequate or absent disclaimers, *see, e.g., Concurring Opinion of Chairman Scott Thomas Re: Advisory Opinion 2004-43* (Feb. 16, 2005), *Dissenting Opinion in Advisory Opinion 2004-43 of Vice Chairman Michael Toner and Comm'r Bradley Smith* (Feb. ____, 2005), Advisory Opinion 2004-43 cannot be read to mandate, and should not be read to suggest, any conclusion as to that hypothetical circumstance, which the Commission concluded was not properly before it.[10] The absence to this date of FCC interpretation of the Communications Act provisions at issue, and their implications for broadcast license holders, provides further caution against drawing broad conclusions from this pinion.

Put even more generally, addressing this request on specific factual grounds does not provide guidance for applying the law in materially different circumstances. Thus, it is incorrect to describe this Opinion as a vote "to deny broadcasters [a] broad waiver." Kenneth Doyle, *FEC Votes 4-2 to Deny Broadcasters Broad Waiver From BCRA Requirement*, BNA MONEY & POLITICS REPORT, Feb. 15, 2005 (headline). Answering an Advisory Opinion Request on one ground does not suggest any conclusion about different circumstances. Put specifically, the conclusion that disclaimers in two particular ads are sufficient under the "stand by your ad" provisions of the FECA, 2 U.S.C. § 441d(d)(1), has no bearing on the obligations of broadcasters under the

[10] FECA provides that a Commission Advisory Opinion rendered under 2 U.S.C. § 437f(a) may be relied upon by "any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered … ." 2 U.S.C. § 437(f)(c)(1)(A).

Communications Act (or the FECA) in relation to ads with inadequate (or no) disclaimers.

Individual Views

Because discussion of this request in the Commission's Open Meeting did include speculation about what rules might apply to inadequate or absent disclaimers (and indeed two draft opinions accepted the premise that disclaimers in the subject ads were inadequate), I will add some individual comments on factors bearing on whether broadcasters must charge candidates a rate higher than the LUC when candidates are not entitled to the LUC under the Communications Act or by virtue of their advertising purchases on the same basis as any other advertiser.

First, I note that any such discussion must begin with the Communications Act, regarding which this Commission has neither jurisdiction nor expertise. Whether a broadcaster must charge a higher rate to an advertiser who is not entitled to a discount mandated by the Communications Act is a question the FCC may be best equipped to answer. (Certain FECA conclusions, however, might follow from Communications Act interpretations the FCC may make.) The FCC may, in addition, have its own views on what qualifies as sufficient compliance with the Communications Act disclaimer requirements, which are similar to, but not identical to those in the FECA. *Compare* 47 U.S.C. § 315(b)(2)(C), (D) *with* 2 U.S.C. § 441d(d)(1). Apparently other Communications Act provisions or FCC regulations, including those requiring equal access for candidates, 47 U.S.C. § 315(a), public interest requirements, *id.* §§ 307(a), 309(a), and perhaps those bearing on the responsibilities of licensees more generally may interact with and affect broadcasters' responsibilities under the "stand by your ad" provisions.

Some have argued, *see Letter of Democracy 21, Campaign Legal Center, and Center for Responsive Politics to Lawrence Norton* (Feb. 11, 2005); *Letter of Democracy 21, Campaign Legal Center, and Center for Responsive Politics to Lawrence Norton* (Dec. 15, 2004); *Concurring Opinion of Chairman Scott Thomas Re: Advisory Opinion 2004-43* (Feb. 16, 2005), that failure to qualify for the LUC discount to which certain candidates are entitled under the Communications Act should lead axiomatically to a conclusion that the LUC is not the "usual and normal charge," 11 C.F.R. § 100.52(d)(2) (definition); *id.* § 100.111(e)(2) (definition), for purposes of the FECA. This simple calculus, however, combines concepts from different statutes, the interaction of which may not be simple or straightforward. In addition, both legal schemes have other provisions, *see* 47 U.S.C. § 315(a) (equal access); *Memorandum of the Office of General Counsel to the Commission,* Agenda Doc. No. 05-08 at 5 (Feb. 8, 2005) (revised blue draft of AO 2004-43) (noting that the Commission has held "that discounts that are less than the usual and normal charge are not contributions if such discounts are offered in the ordinary course of business" (citing AO 2004-18, 1996-2, 1989-14)), which may mandate or permit discounts. The interaction of multiple provisions of these separate legal schemes combined with the variety and complexity of commercial advertising sales practices, *see Letter of National Ass'n of Broadcasters to Mary Dove* (Feb. 11, 2005),

may make it impossible to derive a single, simple proposition to address the variety of circumstances which may occur. Senate debate on this provision does, however, provide some support for a "don't stand by your ad, don't get the discount" interpretation, which should not be ignored in formulating policy or rendering individual decisions relative to these disclaimer requirements.

I am sympathetic to pleas by the requestors and other broadcasters, *see id.; Letter of Missouri Broadcasters Ass'n to Lawrence Norton* (Nov. 19, 2004), not to be enlisted as enforcement agents for campaign finance law. In this request the broadcasters apparently came to a good faith conclusion that Senator Bond's ads did not qualify for the mandatory LUC discount. This Commission came to a different conclusion. Had the broadcasters sought to charge Senator Bond's committee a rate higher than LUC, they would, in this Commission's interpretation, have violated Section 315 of the Communications Act. I see no reason why this agency or our sister commission should cede to, much less thrust upon, broadcasters authority both to interpret our governing statutes and to exercise enforcement authority (through differential rate charging) under both Acts. Indeed, such delegation is arguably contrary to the FECA. *See* 2 U.S.C. § 437c(b)(1) (providing that the Commission "shall have exclusive jurisdiction with respect to civil enforcement" of FECA). The variety of interpretations which might be reached by thousands of broadcasters in hundreds of federal campaigns could hardly be expected to produce a clear and consistent policy.

Discussion of this variety of factors does not lead me to conclude that it is impossible to craft a clear and effective policy regarding the obligations of broadcasters under the "stand by your ad" provisions, and the interaction of those obligations with the FECA. However, such a policy cannot be crafted by this Commission independently of the Federal Communications Commission or without regard to the several statutory and regulatory provisions involved as well as to appropriate adjudicatory and remedial procedures. While the FCC has responsibility for interpretation and enforcement of the Communications Act, it may well be that some cooperative efforts between this agency and the FCC in interpreting parallel statutory requirements and in assessing interactions between the statutory schemes would be helpful.

Nor should our critics hasten to declare that our reticence to opine on obligations of broadcasters under the Communications Act means that we are abdicating our responsibility or failing to enforce the law. The "stand by your ad" disclaimer requirements are incorporated in the FECA, 2 U.S.C. § 441d(d)(1), and campaigns that fail to comply with them are subject to normal FECA enforcement remedies. The Commission certainly can, and in my view should, consider the value of any LUC discount which a campaign received but may not have been entitled to by virtue of a failure to "stand by your ad" in seeking a penalty for any violation. As suggested above, resolution of allegations of violations through the statutory processes outlined in 2 U.S.C.

§ 437c(b)(1) is preferable to (and arguably exclusive of) a system in which individual broadcasters attempt to interpret and enforce the combination of FECA and Communications Act requirements either *sua sponte* or in response to charges from competing campaigns.

February 17, 2005
Date

_signed_____
David Mason
Commissioner

**DISSENTING OPINION IN ADVISORY OPINION 2004-43**

**of**

**VICE CHAIRMAN MICHAEL E. TONER AND**
**COMMISSIONER BRADLEY A. SMITH**

The requestor in this advisory opinion request asked whether a broadcaster was legally prohibited from offering the "lowest unit charge" ("LUC") to a campaign committee that allegedly failed to comply with the "stand by your ad" disclaimer provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[11] The Commission concluded that because the candidate ads in question satisfied the disclaimer requirements of the Federal Election Campaign Act, the broadcaster's decision to provide the LUC, in this instance, did not result in a prohibited in-kind corporate contribution to the candidate.[12]

We dissented from the majority opinion because we believe that the question squarely before the Commission did not turn on the adequacy of the disclaimers in the ads but rather whether, under the plain meaning of the statutory provisions, broadcasters may legally offer federal candidates the LUC. We believe that the Commission could have answered the question more definitively and provided useful and meaningful guidance to other broadcasters similarly situated. Accordingly, for us, whether the candidate ads at issue here satisfied the "stand by your ad" disclaimer requirements is irrelevant because broadcasters have broad statutory discretion to provide candidates with the LUC, even for candidate ads that do not meet the disclaimer requirements.

BCRA amended 315(b) of the Communications Act to provide that a federal candidate "shall not be *entitled"* [emphasis added] to receive the LUC if any of his advertisements have failed to include the required Communications Act Statement. 47 U.S.C. 315(b). Under the plain meaning of these statutory provisions, a candidate who satisfies the Communications Act Statement requirement is guaranteed the LUC as a matter of law. It is equally plain under these statutory provisions that a candidate who

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[11] These terms are incorporated into the Communications Act. See 47 U.S.C. § 315(b).

[12] Commissioners Thomas, McDonald, Mason, and Weintraub voted to approve the advisory opinion. Commissioners Toner and Smith dissented.

fails to include the Communications Act Statement does not have a legal guarantee to receive the LUC. In this circumstance, the statutory language is permissive, making clear that broadcasters have the discretion to provide the LUC to candidates who fail to include the Communications Act Statement, but are not legally required to do so. Therefore, although a candidate may not be "entitled to" the LUC if his ad lacks an adequate disclaimer, the candidate may nevertheless receive the LUC at the discretion of the broadcaster.

This interpretation is consistent with how the FCC has construed the BCRA amendments to the Communications Act. See footnote 5, Agenda Doc. 05-08 (FCC has interpreted BCRA amendments to allow a station to offer the LUC to a candidate who fails to include an adequate Communications Act Statement, as long as the station treats all Federal candidates in a consistent, non-discriminatory manner). See also McConnell v. FEC, 540 U.S. 93, 364 (2003) (Stevens, J., dissenting) (observing that the statute "does not *require* broadcast stations to charge a candidate higher rates for unsigned ads that mention the candidate's opponent. Rather, the provision simply permits stations to charge their normal rates for such ads.") (emphasis in original).

Accordingly, we believe the law plainly permits broadcasters to provide candidates with the LUC, regardless of whether the candidates' ads satisfy the "stand by your ad" disclaimer rules, and we believe the Commission should have decided this matter on that basis.

February 17, 2005

___(signed)_____
Michael E. Toner, Vice Chairman

__(signed)_____
Bradley A. Smith, Commissioner